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NO. _____

IN THE SUPREME COURT
of the
UNITED STATES

October Term 1984

GEORGE FREEMAN,
Appellant,

v.

THE STATE OF WASHINGTON,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE
STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Is RCW 66.24.481, which provides for imprisonment for serving liquor without a banquet permit, constitutional where the statute fails to provide for notice and hearing prior to an individual being placed on a state list of persons precluded from obtaining banquet permits?

2. Did Freeman's placement and continuation on a list which precluded him from obtaining banquet permits without notice and a hearing violate his due process rights?

PARTIES

The parties are the same as those contained in the caption.

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A

OPINIONS BELOW

George Freeman was convicted on three counts of violating RCW 66.24.481 by a jury verdict dated March 12, 1981.

Freeman appealed his conviction to the Court of Appeals of the State of Washington. The Court of Appeals in an unreported opinion dated February 6, 1984, which appears as Appendix A hereto, affirmed the trial court. On April 17, 1984 the Court of Appeals issued an order denying reconsideration of this decision. *See* Appendix B hereto. The Supreme Court of the State of Washington denied Freeman's petition for review of the Court of Appeals decision without opinion on July 13, 1984. *See* Appendix C.

B

STATEMENT OF JURISDICTIONAL GROUNDS

i.) Nature of Proceedings

This is an appeal from George Freeman's criminal conviction in state court on three counts of violating RCW 66.24.481, which prohibits an agent of a public place or club from keeping or serving alcohol unless the public place or club has obtained a banquet permit. Freeman challenges the constitutionality of RCW 66.24.481 on grounds that it offends the due process guarantees of the Fifth and Fourteenth Amendments to the United States Constitution.

ii.) Operative Dates

The decision of the Washington Supreme Court denying review of the Court of Appeals decision was filed July 13, 1984. The decision of the Court of Appeals denying reconsideration of its decision was filed on April 17, 1984. The decision of the Court of Appeals affirming Freeman's conviction was filed on February 6, 1984. Notice of appeal to this Court was filed with the Washington Supreme Court on September 4th, 1984. A subsequent notice of appeal was filed on September 20th, with the Washington Court of Appeals for Division I. A notice of appeal was filed with the trial court on October 10, 1984.

iii.) Statutory Basis of Jurisdiction

Jurisdiction of this Court to hear this appeal is premised upon 28 U.S.C. § 1257(2). The appellant requests that this application be considered in the alternative as a petition for certiorari should the Court deem appeal inappropriate. *See* Stern and Gressman, *Supreme Court Practice*, (5th Ed. 1978) p. 168; *see also*, 28 U.S.C. § 2103.

C.
CONSTITUIONAL AND STATUTORY PROVISIONS

i.) Constitutional Provisions

Fifth Amendment to the United States Constitution:

> No person . . . shall . . . deprive any person of life, liberty or property, without due process of law . . .

Fourteenth Amendment to the United States Constitution:

> No State . . . shall . . . deprive any person of life, liberty or property, without due process of law . . .

ii.) Statutory Provisions

RCW 66.20.010:

> Upon application in the prescribed form being made to any employee authorized by the board to issue permits, accompanied by payment of the prescribed fee, and upon the employee being satisfied that the applicant should be granted a permit under this title, the employee shall issue to the applicant under such regulations and at such fee as may be prescribed by the board a permit of the class applied of, as follows: . . . (3) Where the application is for a special permit to consume liquor at a banquet, at a specified date and place, a special permit to purchase liquor for consumption at such banquet, to such applicants as may be fixed by the board. . . .

RCW 66.24.481:

> No public place or club, or agent, servant or employee thereof, shall keep or allow to be kept, either by itself, its agent, servant or employee, or any other person, any liquor in any place maintained or conducted by such public place, unless the sale of liquor in said place is authorized by virtue or a valid and subsisting license issued by the Washington state liquor control board, or the consumption of liquor in said place is authorized by a special banquet permit issued by said board. Every person who violates any provision of this section shall be guilty of a gross misdemeanor.
>
> 'Public place,' for purposes of this section only, shall mean in addition to the definition set forth in RCW 66.04.010(23), any place to which admission is charged or in which any pecuniary gain is realized by the owner or operator of such place in selling or vending food or soft drinks.

iii.) Rules of Procedure

Washington Rule of Appellate Procedure 2.5(a):

> The appellate Court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction.

D.

G. STATEMENT OF CASE

i) Facts Relating To This Appeal

George Freeman has been convicted of three counts of violating RCW 66.24.481, which prohibits an agent of a public place or club from serving alcohol unelss the public place or club has first obtained a banquet permit. The incidents forming the basis of the convictions occurred on July 19, 1980, July 26, 1980 and August 2, 1980.

Freeman is the pastor of a controversial church known as the Sanctuary. When the church first started in 1977, it obtained a series of banquet permits in order to serve alcohol on church premises during church social functions. The banquet permits were issued in accordance with the policy of the Washington State Liquor Control Board (Board) to give permits to all persons and organizations who applied for them, so long as the persons or organizations were not on the Board's Master Denial List (List).

In July, 1977, Freeman and the church were placed by the Board on the List. The effect of placement on the List was to treat Freeman and his church differently from the rest of the people in the State by preventing any state liquor store employee from issuing a banquet permit authorizing the service of liquor at their social functions.

There is no specific statutory authorization for the List. RCW 66.20.010 provides for no standards for determining who should be denied banquet permits or placed on the List. Nor are there any standards as to how long persons are to remain on the List or how they can get off the List.

As is customary, Freeman's placement on the List was accomplished without any prior notice or opportunity for a hearing. After his placement on the List, Freeman repeatedly requested to be taken off the List or have a formal hearing with regard to the appropriateness of his placement on the List. The Board denied this request because neither the statute nor its regulations provided for a formal hearing. Thereafter, Freeman met with several Board employees, but not with any Board members. The Board never gave Freeman a hearing with regard to his placement on the List, informally or otherwise.

Although Freeman continued to request a hearing, he stopped serving alcohol in the public areas of the church. Instead, he served alcohol on occasion to his friends and members of the congregation in the church rectory, an area where Freeman actually resided. It is for serving alcohol in his residence on July 19, 1980, July 26, 1980, and August 2, 1980, that Freeman was convicted.

ii.) **Raising The Federal Questions**

After his conviction, Freeman moved the trial court for an arrest of judgment on several grounds. Among the grounds urged in his brief was that he had been unconstitutionally denied notice and hearing prior to his placement on the List and during his five year continuation on this List. The trial court denied the motion.

Freeman timely appealed the trial court's denial of his motion for an arrest of judgment to the Court of Appeals, Division I of the State of Washington. In his *pro se* brief to the Court of Appeals, Freeman urged, citing *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), that RCW 66.24.481 was unconstitutional because it failed to provide for notice and a hearing to persons placed on the List. Freeman's court-appointed attorney argued in his brief on behalf of Freeman that the failure to provide notice and hearing prior to Freeman's placement and during Freeman's continuation on the List denied due process.

The Court of Appeals did not rule on Freeman's challenge to the statute, although it did acknowledge that the Board interpreted the statute so as to not require a hearing. As to the second issue, the Court of Appeals held that the Board's failure to afford Freeman notice and a hearing did not constitute a defense to a violation of RCW 66.48.241.

Freeman then filed a petition for review with the Washington Supreme Court. Among the issues raised in Freeman's petition was the contention that RCW 66.24.401 was unconstitutional because it failed to provide for notice and a hearing prior to being placed on the List and during continuation on the List.

This Court should note that Washington Rule of Appellate Procedure (RAP) 2.5(a) specifically authorized Freeman to raise these constitutional arguments on appeal. Washington case law also recognizes the right to raise constitutional issues of the type involved here on appeal. *See, e.g., State v. Regan*, 97 Wn.2d. 47, 640 P.2d 225 (1980).

E.

THE QUESTIONS ARE SUBSTANTIAL

Both the Court of Appeals and the Washington Supreme Court were urged that RCW 66.24.481 and RCW 66.20.010 were unconstitutional because they conflicted with this Court's decision in *Wisconsin v. Constantineau,* 400 U.S. 433, 27 L.Ed.2d 515, 91 S.Ct. 507 (1971). Neither court addressed this contention.

Appellant believes the holding of *Constantineau,* as interpreted by this Court in *Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), is directly on point and requires an invalidation on the challenged statute. Accordingly, it is appellant's belief that a summary reversal may well be appropriate on this issue. *See, e.g., United States v. Haley,* 358 U.S. 644, 79 S. Ct. 537, 3 L.Ed.2d 567 (1959); *Chamberlain v. Dade County Board,* 377 U.S. 402, 84 S.Ct. 1272, 10 L.Ed.2d 1043 (1964).

In *Constantineau,* this Court invalidated a statute which authorized the "posting" of names of individuals to whom the sale of liquor was forbidden because the statute failed to provide for prior notice and hearing to the person whose name was posted. The meaning of *Constantineau* was explained by this Court in *Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976).

In *Paul v. Davis, supra,* Justice Rehnquist, speaking for the Court, stated that due process guarantees necessitating notice and hearing are invoked whenever governmental action deprives a person of rights previously held under state law. *Paul v. Davis,* 424 U.S. at 708, 47 L.Ed.2d at 418.

Since all persons who apply for banquet permits, except those on the List, are given permits, placement on the List alters rights under state law. Therefore notice and hearing are required.

Unless the appellee can suggest some reason as to why the rationale of *Wisconsin v. Constantineau, supra,* and *Paul v.*

Davis, supra, do not apply . to this case, it is respectfully submitted that there is no need for plenary consideration and that this Court should summarily reverse Freeman's conviction as being violative of the Fifth and Fourteenth Amendments to the United States Constitution.

F.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully Submitted,

STAFNE & WETZEL
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October 5, 1984

[Filed 2-6-84
s/ _____
CHIEF JUDGE]

APPENDIX A

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

GEORGE M. FREEMAN,
Appellant,

and
THE MONASTERY, INC.,
a Washington Corporation, and
each of them,
Defendant.

No. 10205-2-I
DIVISION ONE

CALLOW, J.—The defendant, George W. Freeman, appeals a jury verdict which found him guilty of three counts of violating RCW 66.24.481, which prohibits the service or consumption of liquor in a public place or club without a liquor license or banquet permit.

The issues are:

(1) Whether the defendant's constitutional right against unreasonable search and seizure was violated when the Liquor board officers surreptitiously removed liquor samples from the premises he maintained;

(2) Whether RCW 66.24.481 is unconstitutionally void for vagueness and overbreadth;

(3) Whether the trial court erred when it denied the defendant's first motion for a new trial;

(4) Whether the trial court erred when it denied the defendant's motion for an arrest of judgment and his second motion for a new trial; and

(5) Whether the defendant's decision to forego application for a banquet permit, due to alleged misconduct by the Liquor Board, is a defense to the charge of violation of RCW 66.24.481.

The defendant, George W. Freeman, is the pastor of the Sanctuary, a Universal Life Church. The Sanctuary, located at 1900 Boren Avenue, Seattle, Washington, operates a disco dancing establishment on the weekends. It is a three-level structure originally constructed as a church. Entrance is gained through a set of double doors on the west side of the building. Upon entry, one proceeds up a flight of stairs to a podium. The podium has a sign which reads "Recommended tithing, $6 non-members, $4.00 members." Behind the tithing podium is a door which leads to the dance floor. To the left of the podium is a stairway leading to the basement. The basement houses restrooms and kitchen facilities where soft drinks and food are sold. The main floor has a dance floor equipped with sophisticated stereo and disco lighting equipment. Near the entrance to the dance floor is a stairway which leads to the west loft. A sign near the bottom of the stairs reads "Residential Area, by invitation only." The residential area overlooks the dance floor, has a bar, and various seating areas.

Pursuant to a CrR 3.6 suppression hearing, the trial court made the following unchallenged findings:

I.

On June 6, 1980, June 14, 1980, July 19, 1980, July 26, 1980 and August 2, 1980 officers of the Washington State Liquor Control Board, Enforcement Division, entered the premises known as the Sanctuary, a Universal Life Church Monastery located at 1900 Boren Avenue, Seattle, Washington.

II.

The officers involved, [A and B], concealed their true indentity when entering and remaining in the building. During Officer [A]'s first entry to The Sanctuary he was accompanied by someone known to Sanctuary personnel. During Officer [B]'s first entry to The Sanctuary he was accompanied by Officer [A], who had become known to Sanctuary personnel.

III.

On each of the aforementioned dates the officers were admitted to the building voluntarily after paying money at the front door.

IV.

On each of the aforementioned dates the officers were expressly or impliedly admitted to the area designated as the "Residential" loft.

V.

During visits to that area, the officers observed numerous other people taking and drinking beverages served from the wet bar.

VI.

Except on June 6, 1980, on the aforementioned dates, the officers were served liquor from the wet bar in that area with the consent of the person serving the liquor.

VII.

On June 6, 1980, Officer [A] obtained a glass of liquor in the absence of defendants or their agents without express or implied consent knowing the area was not yet open for serving liquor that night.

VIII.

Although the Sanctuary has a policy against the removal of liquor from the "Residential" loft where it is served, on the aforementioned dates, the officers transferred samples of the liquor served them from beverage glasses to glass vials and surreptitously removed them from the building. The vials were subsequently placed into evidence.

IX.

No search warrant was applied for or obtained on the aforementioned dates.

X.

Between October 1977 and August 1980 officers of the Liquor Control Board entered the premises 33 times. On numerous occasions liquor was served.

The trial court concluded that no violation of the fourth amendment to the United States Constitution or of the Washington Constitution, article 1, section 7, had occurred, that there had been no unreasonable search and seizure and that the liquor samples obtained by the undercover officers were administered in evidence.

At trial, the defendant and the State stipulated to the following facts:

"(1) On all dates material in this trial, neither George M. Freeman, The Monastery, Inc., nor the premises located at 1900 Boren Avenue in Seattle had a valid banquet permit or a valid liquor license;

"(2) Beverage samples taken by Officer [A] on June 14, 1980, July 19, 1980 and July 26, 1980, and the sample taken by Officer [B] on August 2, 1980 contained alcohol, specifically beer or wine.

"3) Alcohol served at the premises on July 19, 1980, July 26, 1980 and August 2, 1980 were purchased by George M. Freeman with checks signed by him and drawn on 'The Church Fund' account.

....

"During July and August of 1980, George Freeman resided on the 'residential loft' area of The Sanctuary.

On March 12, 1981, the jury found the defendant guilty of violating the liquor laws. The Jury requested to see the stipulations during its deliberations. The jury's request was denied. The defendant moved for a new trial pursuant to CrR 7.6 claiming the failure of the court to provide the jury with the requested stipulations was prejudicial. His motion was denied. Judgment and sentence was entered on April 9, 1981. The defendant timely appealed. On May 28, 1982, over 14 months after the jury verdict, the defendant again moved for a new trial. On August 2, 1982, he moved for an arrest of judgment. Both motions were denied at a hearing held October 12, 1982. The defendant appeals the order denying his motions for new trial and for arrest of judgment, all of which have been consolidated with this appeal.

The *first* issue is whether the defendant's constitutional right against unreasonable search and seizure was violated when the Liquor Board officers surreptitiously removed liquor samples from the premises.

The defendant Freeman claims the officer's surreptitious removal of the liquor samples violated his justifiable expectation of privacy because he had a well-established policy against any of his guests removing liquor from the "residential loft". *See Katz v. United States*, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967).

In unchallenged findings of fact, the trial court found the Liquor Board officers were voluntarily admitted to the Sanctuary, expressly or impliedly admitted to the "residential loft", and served liquor from the loft's wet bar with the consent of the person serving the liquor. An unchallenged finding of fact is a verity on appeal. *Pier 67, Inc. v. King Cy.*, 71 Wn.2d 92, 94, 426 P.2d 610 (1967).

The fourth amendment of the United States Constitution and the Washington Constitution, article 1, section 7, prohibit *unreasonable* searches and seizures. "[W]hether the search and seizure is unreasonable depends on the circumstances." *State v. Sabbot*, 16 Wn. App. 929, 933, 561 P.2d 212 (1977).

> [W]here a police officer is lawfully on the premises, either pursuant to a search warrant or otherwise,... he is not only authorized but encouraged to keep his wits about him, to see what is to be seen, and hear what is to be heard, and otherwise by employing all of his senses, to be alert to the attendant circumstances.

16 Wn. App. at 933. *See State v. LaPierre*, 71 Wn.2d 385, 428 P.2d 579 (1967). The Liquor Board officers were voluntarily admitted into the Sanctuary, voluntarily admitted into the "residential loft" area, and voluntarily given beer or wine to drink. The fact that the officers were operating in an undercover capacity is irrelevant. The Fourth Amendment "affords no protection to 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'" *United States v. White*, 401 U.S. 745, 749, 28 L. Ed. 2d 453, 91 S. Ct. 1122 (1971) (quoting *Hoffa v. United States*, 385 U.S. 293, 17 L. Ed. 2d 374, 87 S. Ct. 408 (1966)). *See State v. Sabbot, supra* at 937.

> If a householder is in a position to communicate his refusal of admittance and circumstances leading to and surrounding his entry without a warrant are such that a police officer can reasonably conclude he is not being refused entry, then no invitation, express or implied, is necessary to make the officer's entry lawful. A refusal of admittance, express or clearly implied, is essential under such circumstances to make the entry by a policy officer

> without a warrant illegal and in its absence he can be said to enter with the tacit acquiescence of the householder for the householder has failed to place his house and contents under the protection of the Fourth Amendment's protection against unreasonable searches and seizures.

State v. Sabbot, supra at 937-38.

The consensual nature of the Liquor Board officer's presence in the Sanctuary removed the Sanctuary's "residential loft" from the protection of the Fourth Amendment.

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.

Katz v. United States, 389 U.S. at 351. The surreptitious removal of liquor samples voluntarily given to the officers did not violate Freeman's constitutional right against unreasonable search and seizure.

The *second* issue presented is whether RCW 66.24.481 is unconstitutionally void for vagueness and overbreadth. The defendant claims that the definition of "club" used in RCW 66.24.481 is vague because it fails to provide notice of what is considered forbidden conduct.

RCW 66.24.481 provides:

> No public place or club, or agent, servant or employee thereof, shall keep or allow to be kept, either by itself, its agent, servant or employee, or any other person, any liquor in any place maintained or conducted by such public place or club, nor shall it permit the drinking of any liquor in any such place, unless the sale of liquor in said place is authorized by virtue of a valid and subsisting license issued by the Washington state liquor control board, or the consumption of liquor in said place is authorized by a special banquet permit issued by said board.

RCW Title 66 defines "club" as "an organization of persons, incorporated or unincorporated, operated solely for fraternal,

benevolent, educational, athletic or social purposes, and not for pecuniary gain." RCW 66.04.010(5). The defendant claims the definition of "club" is so vague as to arguably include a marital community.

> A statute is unconstitutionally vague if it does not provide fair notice, measured by common practice and understanding, of the conduct that is prohibited. Fair notice exists where persons of reasonable understanding are not required to guess at the meaning of the statute. *State v. Carter,* 89 Wn.2d 236, 570 P.2d 1218 (1977).

State v. Sherman, 98 Wn.2d 53, 56, 653 P.2d 612 (1982) (quoting *State v. Mather,* 28 Wn. App. 700, 626 P.2d 44 (1981)).

A defendant who brings a void for vagueness claim must first establish standing.

> A defendant challenging a statute as denying him due process under the Fourteenth Amendment because of vagueness must test that alleged vagueness by matching the conduct with which he stands charged against the statute. If his conduct clearly fits within the proscriptions of the statute, he does not have standing to challenge the constitutionality of the statute based on vagueness in regard to some hypothetical conduct of some third party.

State v. Hegge, 89 Wn.2d 584, 589, 574 P.2d 386 (1978). *See State v. Sherman, supra* at 56.

The conduct the defendant stands charged with fits within the proscriptions of the statute. The Sanctuary is a non-profit organization operated for fraternal, benevolent, educational or social purposes. Further, the defendant's action, as an agent of the Sanctuary, plainly falls within the core of proscribed behavior. He stipulated the samples taken by the officers contained alcohol, specifically beer and wine; that alcohol was served on the premises of the Sanctuary on July 19, 1980, July 26, 1980, and August 2, 1980; that the alcohol was purchased by him; and that at all relevant times, the Sanctuary did not have a liquor license or banquet permit. It is irrelevant that the definition of "club" may arguably include a marital community. The defen-

dant has failed to establish standing to challenge RCW 66.24.481 on the basis of vagueness since his conduct definitely falls within the arena of conduct proscribed by the statute.

However, the defendant is not precluded from challenging the statute on the basis of unconstitutional overbreadth. *See State v. Sherman, supra* at 56. He claims the statute infringes upon his constitutional right to freedom of association, specifically, to associate privately in his home for "fraternal, benevolent, educational, athletic or social purposes," and is thus, unconstitutionally overbroad.

> "[O]verbreadth" goes to the question of substantive due process, *i.e.*, whether the statute in question is so broad that it may not only prohibit unprotected behavior but may also prohibit constitutionally protected activity as well.

Blondheim v. State, 84 Wn.2d 874, 878, 529 P.2d 1096 (1975).

The defendant claims RCW 66.24.481 infringes upon his First Amendment right to freedom of association. However, the statute does not regulate a person's right to associate. The statute regulates the consumption, sale or dispensing of intoxicating beverages. The right to consume, sell, or dispense alcohol is not guaranteed by the constitution.

> Not only is the freedom to consume alcohol not "explicitly or implicitly guaranteed by the Constitution" *(San Antonio Independent School Dist. v. Rodriquez,* 411 U.S. 33, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973)), it is specifically made subject to restriction and regulation by the Twenty-First Amendment. *See Republican College Council v. Winner,* 357 F. Supp. 739, 740 (E.D. Pa. 1973).

Houser v. State, 85 Wn.2d 803, 806 n.4, 540 P.2d 412 (1975). After the repeal of prohibition, the Legislature enacted the Washington State Liquor Act, now found in Title 66 of the Revised Code of Washington. The constitutionality of the Act was upheld in *Ajax v. Gregory,* 177 Wash. 465, 469, 32 P.2d 560 (1934).

> The right of the state, in the exercise of its police power, to either prohibit entirely the sale of intoxicating liquors or regulate the sale thereof is thoroughly established. The manner, and extent of the regulation, if there be regulation, rests in the legislative judgment of the state, and is a matter of legislative policy.

"There is no constitutional right to use intoxicating liquor. When a right exists, it is in the nature of a permission and must be exercised according to law." *State v. Lake City Bowlers' Club, Inc.*, 26 Wn.2d 292, 295, 173 P.2d 783 (1946).

We fail to see how the statute infringes upon the defendant's freedom of association. He is at liberty to associate with anyone for "fraternal, benevolent, educational, athletic or social purposes." We reject the claim of overbreadth.

The *third* issue presented is whether the trial court erred when it denied the defendant's first motion for a new trial.

The defendant contends the motion should have been granted on two grounds. First, he alleges communication took place between the bailiff and the jury outside the presence of the defendant and/or his counsel and that such communication is presumptively prejudicial, rebuttable only by a showing of harmless error. Second, he claims the jury should have been given the stipulations pursuant to their request, and the failure to provide the jury with the alleged stipulations was prejudicial as a matter of law.

The defendant contends that communication took place between the bailiff and the jury. However, the record does not substantiate this allegation. The defendant provided this court with a partial verbatim report of the hearing on the motion for a new trial. The partial verbatim report only contained the trial judges ruling and did not mention any alleged communication between the bailiff and the jury. Thus, the record is inadequate for us to resolve the defendant's claim of error. We decline to address the issue. *See State v. Blight*, 89 Wn.2d 38, 47, 569 P.2d 1129 (1977).

The defendant also contends the trial court erred when it failed to provide the jury with the stipulations pursuant to the jury's request. However, he has failed to cite authority in support of his allegation.

> Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none. Courts ordinarily will not give consideration to such errors unless it is apparent without further research that the assignments of error presented are well taken.

State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

The defendant's assignment of error is not well taken. The granting or denial of a motion for a new trial is within the discretion of the trial judge whose ruling will not be reversed absent a clear abuse of discretion. *State v. Wilson*, 71 Wn.2d 895, 899, 431 P.2d 221 (1967). An abuse of discretion occurs where no reasonable person would have taken the view adopted by the trial court, that is, if the discretion is manifestly unreasonable or exercised or untenable grounds for untenable reasons. *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979), *State v. Blight, supra*. We find no abuse of discretion. The ruling denying the defendant's request for a new trial is affirmed.

The *fourth* issue presented is whether the trial court erred when it denied the defendant's motion for arrest of judgment and the second motion for a new trial. He claims the trial court should have granted these motions based on his allegations that the Liquor Board violated his constitutional rights.

The defendant moved for a new trial in late May of 1982. He claimed his motion should be granted pursuant to the CrR 7.6(a)(3), (5) and (8), based on alleged newly discovered evidence. CrR 7.6 provides in part:

> (a) *Grounds for New Trial.* The court on motion of defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:
>
> ....
>
> (3) Newly discovered evidence material for the defendant, which he could not have discoverd with reasonable diligence and produced at trial;
>
> ....
>
> (5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial;
>
> ....
>
> (8) That substantial justice has not been done. When the motion is based on matters outside the record, the fact shall be shown by affidavit.
>
> (b) *Time for Motion.* A motion for a new trial must be served and filed within five days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time.

(Emphasis added.) The jury verdict was filed March 12, 1981. The defendant's motion for a new trial was filed in late May of 1982, more than 14 months after the verdict. His motion for arrest of judgment based on CrR 7.4(a)(3), "insufficiency of the proof of a material element of the crime," was filed August 2, 1982. CrR 7.4(b) also provides that "a motion for an arrest of judgment must be served within five days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time."

At the October 12, 1982 hearing, the trial court ruled the motions were untimely. As stated, the granting or denial of a motion for a new trial is within the sound discretion of the trial court whose ruling will not be disturbed absent a clear abuse of discretion. *State v. Wilson, supra.* The same rule applies to the timeliness of a motion for an arrest of judgment. *See State v. Ross*, 20 Wn. App. 448, 455, 580 P.2d 1110 (1978). The ruling that the motions were untimely was not an abuse of discretion:

both motions were filed long after the 5 days provided for in CrR 7.6(b) and CrR 7.4(b). The trial court is affirmed.

In the interests of judicial economy, the trial court made an alternate ruling. It ruled that the defendant had not presented a sufficient basis for a new trial since none of the evidence was "newly discovered evidence" in the sense the evidence "could not have [been] discovered with reasonable diligence and produced at trial." CrR 7.6(a)(3). The court ruled that the police reports which were not disclosed pursuant to discovery were cumulative and were not such an irregularity in the proceedings as to prevent the defendant from having a fair trial. CrR 7.6(a)(5). Further, the court ruled that the defendant failed to show that substantial justice had not been done, CrR 7.6(a)(8), since the affidavits filed by the defendant did not establish any discrimination on the part of the Liquor Board.

After reviewing the record, we find the trial court did not err when it made its alternate ruling. All of the evidence submitted by the defendant at the October 21, 1982 hearing was known or capable of being known at the time of the trial. The undisclosed police reports were cumulative. Further, the evidence and affidavits submitted at the hearing failed to establish that the defendant was denied a banquet permit on the basis of his sexual preference.

The defendant nonetheless asserts that the evidence presented at the hearing was sufficient to support his claim of constitutional misconduct on the part of the Liquor Board and may be raised for the first time on appeal. *See State v. Regan*, 97 Wn.2d 47, 640 P.2d 725 (1982). He claims his conviction should be reversed since he was unable to obtain a permit due to the alleged unconstitutional conduct on the part of the Liquor Board.

The defendant correctly asserts that his allegations of constitutional misconduct by the Liquor Board may be considered for the first time on appeal. *State v. Regan, supra.* This raises the *final* issue, whether the defendant's failure to apply for a ban-

quet permit, due to alleged misconduct on the part of the Liquor Board, is a defense to his conviction for serving liquor without a license or banquet permit.

The defendant first alleges the Board placed him on the banquet permit master denial list because his is a homosexual and because his church, the Sanctuary, caters to predominantly homosexual (gay) persons. Anyone placed on the list will be denied a banquet permit unless they can show the Board why they should remove that person from the list. A careful review of the record fails to establish that the defendant was placed on the list because of his sexual preference.

The defendant and the Sanctuary came to the attention of the Board in 1977 when several validly licensed gay bars in the area complained that the defendant was serving liquor past 2 a.m. and was serving liquor to minors. Board investigators noted numerous liquor violations after visiting the premises on several occasions. The Board informed the defendent of the violations, but noted no change in the defendant's or the Sanctuary's policies. As a result, the defendant and several other persons connected with the operation of the Sanctuary were placed on the master denial list. After the defendant became aware of his status, he requested a hearing. The Board informed the defendant that no formal hearing for the denial of a banquet permit was provided for by law, nor was a formal hearing provided for by the Board's rules and regulations. However, the defendant was advised that the Board would conduct an informal hearing, upon request, at which time he could submit information for the Board to consider in re-evaluating his placement on the master denial list. The defendant attended the informal hearing, accompanied by his attorney. At the hearing, he was told that the reason he was placed on the master denial list was due to various liquor law violations. One of the Board's personnel recommended that the defendant apply for a liquor license, but instead of applying for a license, the defendant decided to serve liquor at the Sanctuary without a permit.

It is true that a Liquor Board investigator's memorandum made several references to gay persons. However, the statements about gay persons were followed by the notation "per Freeman", to denote that the statement was a paraphrasing of what the defendant had said at the informal hearing. Further, the statements were made after the defendant was placed on the master denial list. We note that several gay bars in the vicinity of the Sanctuary operate with a valid liquor license without any evidence of Board discrimination on the basis of the clientele. The defendant's allegation of discrimination is not meritorious.

The defendant also alleges a violation of his due process rights because the Board used no objective standards to place him on the master denial list and because he was placed on the list allegedly without notice and a hearing. However, we need not reach the issue concerning the alleged unconstitutionality of the master denial list unless such unconstitutionality is a defense to the crime with which the defendant was charged and convicted.

The defendant was charged and convicted of violating RCW 66.24.481, which prohibits the service or consumption of liquor in a public place or club without a liquor license or banquet permit. The jury was instructed on the elements of RCW 66.24.481 as follows:

> To convict the defendant George M. Freeman of the offense charged in Count[s] I [, II, and III] each of the following elements of the offense must be proved beyond a reasonable doubt:
>
> (1) That on or about July 19, 1980 [, July 26, 1980, and August 2, 1980] George M. Freeman acted as an agent, servant or employee of a place maintained as a public place or club;
>
> (2) That he kept liquor and allowed liquor to be kept and consumed on the premises of such public place or club;
>
> (3) That he acted without authorization of a liquor license or a special banquet permit issued by the Washington State Liquor Control Board; and

(4) That the acts occurred in King County, Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

The jury instruction was nearly identical to the defendant's proposed instruction. He took no exception to the preceding instruction which is, therefore, the law of the case. *State v. Robinson*, 92 Wn.2d 357, 359, 597 P.2d 892 (1979).

The mental element of the crime is found is section (2) of the instruction. The defendant's reasons for not applying for a banquet permit do not negate the mental element of section (2), to-wit, that he kept liquor and allowed liquor to be kept and consumed on the Sanctuary's premises. No question of intent is involved in the third element of the crime, whether the defendant acted without a liquor license or banquet permit. Further, he stipulated that on all dates concerned, he acted without a valid liquor license or banquet permit. His reasons for acting without a license do not constitute a defense.

The judgment is affirmed.

s/ _____
CALLOW, J.

WE CONCUR:

s/ _____ s/ _____

APPENDIX B

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

GEORGE M. FREEMAN,
Appellant,

and

THE MONASTERY, INC., a
Washington corporation
and each of them,
Defendant.

No. 10205-2-I
DIVISION ONE

ORDER DENYING
MOTION FOR RECONSIDERATION

The appellant, George M. Freeman, having filed a motion for reconsideration herein; the respondent, State of Washington, having filed its answer to said motion, and the court having determined that it should be denied; Now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same hereby is, denied.

DATED this 27th day of April, 1984.

s/ _____
Acting Chief Judge

[Filed 4-27-84]

APPENDIX C

The Supreme Court

REGINALD N. SHRIVER
CLERK

State of Washington
Olympia
98504

July 13, 1984

Mr. Scott Stafne
Attorney at Law
1111 Smith Tower
Seattle, Washington 98104

Honorable Norm Maleng
King County Prosecutor
Mr. Steve Moore, Deputy
King County Courthouse
Seattle, Washington 98104

Re: Supreme Court No. 50643-4- State v. George M. Freeman
Court of Appeals No. 10205-2-I

Counsel:

The above entitled petition for review was considered by the Court on its July 13, 1984, petition for review calendar.

The petition was denied by order number 127/49 filed on July 13, 1984.

Very truly yours,
s/ _____
REGINALD N. SHRIVER
Supreme Court Clerk

RNS:tt